



**SUPREME COURT, U. S.**

**Supreme Court of the United States**

**OCTOBER TERM, 1967.**

**No. 508**

Office Supreme Court, U.S.  
**FILED**

**SEP 18 1967**

**JOHN F. DAVIS, CLERK**

**THELMA LEVY, in her capacity as administratrix of the succession of LOUISE LEVY and as tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY and AUSTIN LEVY,**

**versus**

**THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D., and A. B. C. INSURANCE COMPANIES.**

**Appeal from the Supreme Court of Louisiana.**

**BRIEF IN SUPPORT OF MOTION TO DISMISS AND/OR AFFIRM.**

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**SUPREME COURT OF THE UNITED STATES**  
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**No.**

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**THE STATE OF LOUISIANA** through the **CHARITY HOSPITAL OF LOUISIANA** at **NEW ORLEANS BOARD OF ADMINISTRATORS** and **W. J. WING, M.D.**, and **A. B. C. INSURANCE COMPANIES**.

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**Appeal from the Supreme Court of Louisiana.**

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**BRIEF IN SUPPORT OF MOTION TO DISMISS  
AND/OR AFFIRM.**

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**STATEMENT OF THE CASE.**

Appellants brought this action under Louisiana Civil Code Article 2315 alleging that they were the minor children of decedent, Louise Levy, and hence entitled to recover for the wrongful death of Louise Levy. The children were concededly illegitimate. Appellees excepted to the petition and their exceptions were sustained. An appeal was taken by the appel-



lants only as against Dr. Wing and Interstate Fire and Casualty Company. The Court of Appeal, Fourth Circuit, affirmed the judgment of the lower court and denied appellants a right or cause of action under Article 2315 because of their illegitimacy. Appellants then sought review in the Supreme Court of Louisiana and they were denied a writ of certiorari. From this denial, an appeal to the Supreme Court of the United States was sought.

### **ARGUMENT.**

**MAY IT PLEASE THE COURT:**

- I. THE APPEAL SHOULD BE DISMISSED SINCE AN INTERPRETATION OF A STATE STATUTE IS QUESTIONED ON CONSTITUTIONAL GROUND AND NOT THE CONSTITUTIONAL VALIDITY OF SAID STATUTE.**

Appellants herein are seeking recovery under the very same statute which they claim is unconstitutional. Appellants claim a right of action for wrongful death pursuant to Louisiana's wrongful death statute. Yet, appellants attack the constitutionality of the very statute under which they seek redress.

The arguments of the appellants are directed not at the constitutional validity of the statute but rather at the interpretation of the word "child" as used in the statute. Thus, the claims of appellants are claims grounded upon unconstitutional interpretation of the State statute. Appellants do not question the validity of the statute as such.

No appeal should lie from an alleged unconstitutional interpretation of an otherwise valid State statute. *Commercial Bank vs. Buckingham*, 46 U. S. 317, 5 How. 317, 12 L.Ed. 169 (1847). See also *Congdon, etc., Min. Co. vs. Goodman*, 67 U. S. 574, 2 Black 574, 17 L.Ed. 257 (1862); *Smith vs. Hunter*, 48 U. S. 738, 7 How. 738, 12 L.Ed. 894 (1849); *Scott vs. Jones*, 46 U. S. 343, 5 How. 343, 12 L.Ed. 181 (1847).

## **II. ILLEGITIMATE CHILDREN HAVE NO RIGHT OR CAUSE OF ACTION UNDER ARTICLE 2315 OF THE LOUISIANA REVISED CIVIL CODE OF 1870.**

### **(a) A Right or Cause of Action for Wrongful Death Did Not Exist at Common Law or Civil Law and Is Solely a Creation of State Statutory Law and Must Be Construed Strictly.**

The Common Law did not grant a right or cause of action for wrongful death. The Civil Law was to the same effect. *Panama R. Co. vs. Rock*, 266 U. S. 209, 45 S.Ct. 58, 69 L.Ed. 250 (1924). As a result, the right and cause of action for wrongful death is a creature of statute. According to Judge Dawkins of the Western District of Louisiana, "To begin with the cause of action under Article 2315—originally non-existent under civil or common law . . . was created by the Legislature, in derogation of common or civil right. Therefore, as the Louisiana courts repeatedly have said, it must be narrowly, strictly construed . . . cause of action for wrongful death, created by Article 2315, is substantive, purely personal, and accrues only to the beneficiaries named, in the order



of their naming." *Bounds vs. T. L. James & Co.*, 124 F.Supp. 563, 567 (W.D. La., 1954).

The action for wrongful death is purely statutory in Louisiana, being found in Article 2315 of the Revised Civil Code of Louisiana. *Premeaux vs. Henry Ford & Son*, 155 La. 112, 98 So. 858 (1924); *Premeaux vs. Henry Ford & Son*, 155 La. 106, 98 So. 856 (1924); *Thaxton vs. Louisiana Ry. & Nav. Co.*, 153 La. 292, 95 So. 773 (1923); *Van Amburg vs. Vicksburg, S. & R.R. Co.*, 37 La. Ann. 650 (1885); *Hubgh vs. New Orleans & C. R. Co.*, 6 La. Ann. 495 (1851).

This statute governs all rights and causes of action for wrongful death and is to be construed *sui generis* and strictly. *Maher vs. Schlosser*, 144 So.2d 706 (La. App. 1962); *Young vs. McCullum*, 74 So.2d 339 (La. App. 1954); *Conrad vs. Citizens Cas. Co. of N.Y.*, 141 F.Supp. 166 (E.D. La. 1956); *Miller vs. American Mut. Liab. Ins. Co.*, 42 So.2d 328 (La.App. 1949); *Reed vs. Warren*, 172 La. 1082, 136 So. 59 (1931); *Kerner vs. Trans-Mississippi Terminal R.R.*, 158 La. 853; 104 So. 740 (1925); *Flash vs. Louisiana Western Ry. Co.*, 137 La. 352, 68 So. 636 (1915); *Chiners vs. Roger*, 50 La. Ann. 57, 23 So. 100 (1898).

Louisiana conferred the action for wrongful death and prescribed the terms upon which the action might be asserted. In this regard, a Pennsylvania court held:

"It must be remembered that at common law there was no right on the part of survivors to sue

for their father's or husband's death and they must now take the privilege upon the terms granted by the . . . legislature . . . and one of those terms is that the parties must be lawful children or a lawful widow. Petitioners have found no cases which give illegitimate children any right to recover in a death action and we believe there are none such." *Kemmerer vs. Reading Co.*, 64 Pa. D & C 433, 23 Lehigh Co. L.J. 5 (1948).

**(b) Article 2315 Defines Rights In Terms of Status and Makes No Exceptions Based Upon Particular Factual Situations.**

The law creating the action for wrongful death and the right to assert that action speaks of its beneficiaries only in terms of status. It speaks of a "surviving spouse and child or children," the "surviving father and mother of the deceased" and the "surviving brothers and sisters of the deceased." Article 2315. The law does not attempt to make any distinctions based upon the loving father or mother and the less attentive parent, the loyal and disloyal child, the unfaithful and faithful wife, the unconcerned as opposed to the dedicated brother or sister. The law is blind to the personal qualities that may color and distinguish a relationship; it asks only that the relationship exist, and, therefore, the status.

(c) "Child" As Used in Article 2315 of The Revised Civil Code of 1870 Means Legitimate Child.

Speiser in his work *Wrongful Death* declares:

"Tiffany, in his pioneer treatise on wrongful death, comments that '(a) bastard is not a "child," within Lord Campbell's Act.'

If there is a general rule today, it is probably that the word 'child' or 'children' when used in a statute pertaining to wrongful death beneficiaries, refers to a legitimate child or to legitimate children, and thus only legitimates can recover for the wrongful death of their parents. This is merely an application of the principle that statutes patterned after Lord Campbell's Act which use the word 'kin' mean legitimate kin, and that where such statutes say 'father' or 'mother,' 'children,' 'brothers' or 'sisters,' they mean only legitimate father, mother, children, brothers or sisters." Speiser, *Wrongful Death*, § 10.4, 537. See, also, 72 A.L.R. 2d 1235.

Louisiana's jurisprudence is replete with cases which indicate that "child" means legitimate child and that illegitimate children may not recover for the wrongful death of a parent. *Chivers vs. Couch Motor Lines*, 159 So.2d 544 (La.App. 1964); *Carter vs. Canal Ins. Co.*, 154 So.2d 476 (La.App. 1963); *Carter vs. Musso*, 151 So.2d 97 (La.App. 1963); *Scott vs. La Fontaine*, 148 So.2d 780 (La.App. 1963); *Buie vs. Hester*, 147 So.2d 733 (La.App. 1962); *Cheeks vs. Fidelity and*

*Casualty Co. of New York*, 87 So.2d 377 (La.App. 1956); *Jackson vs. Lindlom*, 84 So.2d 101<sup>st</sup> (La.App. 1956); *McConnell vs. Webb*, 226 La. 385, 76 So.2d 405 (1954); *Board of Port Commissioners vs. City of New Orleans*, 223 La. 199, 65 So.2d 313 (1953); *Thompson vs. Vestal Lumber and Mfg. Co.*, 16 So.2d 594, aff'd. 22 So.2d 842 (La.App. 1944). It is well settled that a right of recovery in favor of a child or children under Article 2315 of the Civil Code is limited to a legitimate child or children. *Thompson vs. Vestal Lumber and Mfg. Co.*, 208 La. 83, 22 So.2d 842 (1944); *Youchican v. Texas and Pacific Ry. Co.*, 147 La. 1080, 86 So. 551 (1920); *Green vs. New Orleans S & G.I.R. Co.*, 141 La. 120, 74 So. 717 (1917); *Landry vs. American Creosote Wks.*, 119 La. 231, 43 So. 1016 (1907); *Lynch vs. Knoop*, 118 La. 611, 43 So. 252 (1907).

The strength of the requirement of legitimacy is evidenced by the fact that children of a putative marriage may not recover under Article 2315. Putative children must be legitimated. *Chivers vs. Couch Motor Lines*, *supra*; *Carter vs. Musso*, *supra*; *Buie vs. Hester*, *supra*; *Jackson vs. Lindlom*, *supra*.

It makes no difference that the illegitimate child was dependent upon the parent for support. *Board of Port Commissioners vs. City of New Orleans*, *supra*.

Acknowledgment will not serve to cure a defect in legitimacy. *Lynch vs. Knoop*, *supra*; *Scott vs. La Fontaine*, *supra*; *Cheeks vs. Fidelity and Casualty Co. of New York*, *supra*.

**(d) Louisiana Has Long Denied A Right Or Cause of Action To Illegitimates.**

The jurisprudence just cited goes back to 1907 when *Lynch vs. Knoop, supra*, was decided. Had the interpretation of Article 2315 by the courts as requiring legitimacy been incorrect, it only stands to reason that the Legislature of Louisiana would have seen fit to so alter the codal article as to permit a recovery. In *Abraham vs. Connecticut Fire Ins. Co.*, 177 So.2d 295, 302 (La.App. 1965), it was declared:

“The statute being *sui generis*, this court is not at liberty to question the wisdom of the legislature in confining, restricting and limiting the benefits of the law to those classes of relations expressly enumerated. Conceding the authority of the legislature to include illegitimate relations within the scope of the statute if that body so desires, it nevertheless remains it has not as yet seen fit to do so. We can only conclude, therefore, that the legislature did not intend to extend to illegitimate or natural brothers and sisters the initial right of survivorship of those actions as encompassed in subject statute.”

See, also, *Cheeks vs. Fidelity & Casualty Co. of N.Y.*, 87 So.2d 377 (La.App. 1956).

**(e) Because Louise Levy Treated Her Children As Though They Were Legitimate And Loved Them, There Exists No Basis For Making An Exception To The Rule of Legitimacy.**

The children on whose behalf this action was brought were concededly illegitimate. But it has been



argued that because their mother loved them and sacrificed for them and treated them as though they were legitimate, they should be admitted to that status to which legitimates are entitled, namely, a right and cause of action for wrongful death.

Undoubtedly many mothers have loved their illegitimate children, have sacrificed for them and have treated them as legitimate. But the quality of the relationship between parent and child should not be permitted to overcome the inadequacy of status. See, *Youchicon vs. Texas & Pacific Ry. Co.*, 147 La. 1080, 86 So. 551 (1920). As pointed out earlier: putative children may not recover, dependent illegitimate children may not recover and acknowledged children may not recover. Surely these putative, dependent and acknowledged children were loved by the parent, who sacrificed for the child and who treated the child as legitimate. But Louisiana has not granted exceptions in those cases and there exists no reason why it should do so in this case.

### **III. TO REFUSE TO ALLOW THESE APPELLANTS A RIGHT OF RECOVERY IS NOT VIOLATIVE OF THE DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS REQUIREMENTS OF THE STATE AND FEDERAL CONSTITUTIONS.**

The mere denial of a right conferred by state law does not involve a denial of equal protection of the law; there must be an intention and purpose to discriminate shown, and the denial must be arbitrary. *Morey vs. Doud*, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.



2d 1485 (1957); *McGowan vs. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1960); *Stebbins vs. Riley*, 268 U.S. 137, 45 S.Ct. 424, 69 L.Ed. 884 (1924); *Steier vs. N. Y. State Ed. Comm.*, 271 F.2d 13 (2nd Cir. 1959); *Hanna vs. Home Ins. Co.*, 281 F.2d 298 (5th Cir. 1960); *Tullier vs. Giordano*, 265 F.2d 1 (5th Cir. 1959); *Ventre vs. Ryder*, 176 F.Supp. 90 (W.D. La., 1959); *W.M.C.A. vs. Simon*, 208 F.Supp. 368 (S.D. N.Y., 1962). The element of intentional or purposeful discrimination necessary to establish a denial of equal protection of the law is not presumed. *Snowden vs. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1943). In *Snowden vs. Hughes*, *supra*, the Court said:

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination . . . But a discriminatory purpose is not presumed . . . there must be a showing of 'clear and intentional discrimination' . . ."

Appellants have shown no clear and intentional discrimination.

- (a) **The Classification of Persons As Legitimate And Illegitimate Is Not Arbitrary, Unreasonable or Capricious And Is Related To The General Health, Welfare And Morals of The People of Louisiana.**

The essence of appellants' argument is against the requirement that beneficiaries under Article 2315

be legitimate. Appellants object to the classification of persons into legitimate persons and illegitimate persons. Appellants seemingly would want the class of persons entitled to recover to be broadened to include illegitimates, or to include a class of illegitimates who love their mothers and who are loved by their mothers, who sacrifice for them and treat them as legitimate.

But the classification which prevails is into legitimates and illegitimates. And this classification need only be reasonable and properly related to a legislative purpose. See, 16 Am. Jur. 2d 494, 495, 496, 497, 498.

In *Morey vs. Doud*, 354 U.S. 457, 463, 77 S.Ct. 1344, 1349, 1 L.Ed. 1485 the Court stated:

"The 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination' . . . The equal protection clause does not take from the State the power to classify . . . but admits of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality."

The question arises as to whether the classification into legitimates and illegitimates is a reasonable

classification connected with a legitimate legislative purpose. The requirement of legitimacy has a number of deep policy roots.

The most often espoused reason for denying illegitimates rights conferred upon legitimates is seen in an argument based upon the general welfare and morality of a people. The state has an interest in the preservation of the family, in the promotion of the marital institution, in the discouragement of promiscuity and generally decadent morality.

Similarly, the system of those legal institutions, which are an outgrowth of family law, require that a system based on legitimacy of relationships prevail. To allow persons who may claim to be the illegitimate offspring of persons long since dead to claim legal rights would invite chaos where certainty is required. The problem of proof or disproof as the case might be would be insurmountable. The door to dishonest claims would be opened. Illegitimates could make claims and the evidence needed to disprove the claimed relationship would doubtlessly lie with the deceased.

Thus, the general morality and welfare and the security of legal institutions underlie the requirement of legitimacy, and, therefore, a classification of persons into legitimates and illegitimates is meritorious.

An argument as to the unconstitutionality of the distinction between persons as legitimate and illegiti-

mate was presented in *Benjamin vs. Hardware Mutual Casualty Co.*, 244 F.Supp. 652 (W.D. La., 1965) at 653. Judge Putnam of the Western District of Louisiana declared:

"In addition to the argument as to the status of these minors plaintiffs urge that Article 2315 of the Civil Code should be declared unconstitutional inasmuch as it discriminates against illegitimate children and does not afford them an opportunity to sue for the wrongful death of their natural parent, while it does afford this right to legitimate children. Without discussing the obvious error in this position, suffice it to say that this statute is not under attack in this proceeding. If by some legal alchemy plaintiffs have developed a new field in the matter of civil rights litigation, it should be properly raised in a suit filed for that purpose."

The Court of Appeals for the Fifth Circuit passed upon the very issue raised in this matter in June of 1967 in *Glonn vs. American Guarantee and Liability Ins. Co., et al.*, No. 24181 (5th Cir. 1967). The case expressly declared that the classification of persons into legitimate and illegitimate for the purpose of Article 2315 of the Louisiana Civil Code was a reasonable legislative classification.

In the *Glena* case, a mother sued for the wrongful death of her son who was illegitimate but was informally recognized by her. Passing upon the issue of legitimacy, the Court declared:

"As to plaintiff's argument that the construction by the Louisiana courts of Article 2315, Civil Code of Louisiana, so restricts said provision that it violates the equal protection clause of the Fourteenth Amendment, this Court is clear to the conclusion that the Fourteenth Amendment does not prohibit States from classification but only prohibits classification upon an unreasonable basis. It cannot be said that the classification here by the Louisiana courts is unreasonable. *Morey vs. Doud*, 354 U. S. 456."

Finally, the classification into legitimates and illegitimates developed by the Louisiana courts in connection with its wrongful death statute should not be declared unreasonable and every presumption exists in favor of its reasonableness. *Morey vs. Doud*, *supra*. The wrongful death statutes of other States, workmen's compensation laws, inheritance laws, laws regarding support of minors, welfare legislation and a host of other laws, both Federal and State, have, throughout their history, often classified the rights of persons as dependent upon their legitimacy. It cannot be said that no reason existed for these classifications.



**CONCLUSION.**

For the reasons stated above, the appeal herein should be dismissed or the judgment below affirmed.

Respectfully submitted,

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**CERTIFICATE.**

I HEREBY CERTIFY that a copy of the above and foregoing Brief has been served upon Mr. Adolph J. Levy and Mr. Lawrence J. Smith, 1407 Pere Marquette Building, New Orleans, Louisiana, by depositing same in the United States Post Office, first class, postage prepaid, addressed as above this .... day of September, 1967.

I FURTHER CERTIFY that copies of the above and foregoing Brief have been served upon Mr. Norman Dorsen, 40 Washington Square, South, New York, New York, 10003, and upon Mr. Melvin L. Wulf, 156 Fifth Avenue, New York, New York, 10010, by depositing same in the United States Mailbox, Air Mail postage prepaid, addressed as above, this .... day of September, 1967.

.....,  
WILLIAM A. PORTEOUS, JR.